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MEMO

June 12, 2003
To: John Ferry, State Court Administrator

From: Roland C. Fancher, Kalamazoo County Friend of the Court

Subject: Comments on Administrative Memorandums 2003-22:1 to 2003-22:11

This memorandum provides commentary on the eleven memorandums promulgated by the State Court Administrative Office relating to proposed changes in the 2004 Michigan Child Support Formula.

ADM 2003-22:1 Citation and Reorganization of Contents.

This proposal will restructure the Michigan Child Support Formula Manual to make it easier to cite references to the Manual, and also reorganize the contents of the Manual in a more logical fashion, similar to the court rules. It will make the citation of the Formula more specific, and the flow of the Formula more logically based. **I view this as a positive change and support this proposal.**

ADM 2003-22:2 Calculation of Child Support Before Spousal Support.

This proposal will require that child support be calculated without regard to alimony or spousal support paid between the parties in the case under consideration. Persons who participated in the early creation of the Formula (then Guidelines) in the mid-1980's indicate that it was not their intent to consider alimony awarded between the parties before determining child support, but only alimony that was paid or received in cases not involving the two parties to the dispute in question. Supporting this proposal is the position that calculation of child support independently from spousal support focuses more attention on the needs of the children, with attention on the needs of the parents being given secondary consideration. Protection of the needs of the children first seems to be a better public policy than the reverse. **I support this proposal.**

ADM 2003-22:3 Shared Economic Responsibility Retroactive Clarification

This proposal clarifies when the shared economic responsibility formula (SERF) should be used. It states that SERF should only be applied to initial determinations *and modifications* based upon changed circumstances. It cannot be retroactively applied to existing orders in a manner

inconsistent *with MCL 552.603(2) [The non-retroactive modification statute]. This clarifies that SERF can be used in modifications even if it was not used in the initial order. I view this as an equity issue, i.e., all cases should operate under the same rules regardless of when the initial order was entered. **I support this proposal.**

ADM 2003-22:4 Deviation from the Formula

This proposal will increase the level of discretion given to courts for determining when deviation from the Formula is appropriate and allowable. The proposal clarifies some language of the current provision, and for the first time a list of eleven specific issues for consideration is provided in new subsection 1.04(d). These factors deal primarily with unusual economic situations.

Factor (a) deals with children with special needs. This should be relatively non-controversial, due to the additional costs involved in raising these children.

Factor (b) deals with children with extraordinary educational expenses. This is more controversial, as it may lead to some heated arguments in situations where one parent has unilaterally made educational decisions for a child and seeks contribution from the other parent who disagrees with the underlying educational decision. It will present significant issues where the parents are in unequal economic circumstances.

Factor (c) deals with situations where one or both of the parents are minors. This could open a wide variety of deviation. If a non-custodial parent is in high school, does this anticipate a lower support amount or suspension of support until graduation? Does this lessen the needs of the child? If a custodial mother who is a minor is still in high school, is higher support warranted for the child to allow the mother to complete school? Will this create a type of palimony in paternity cases where a minor mother has "greater needs" because of her student status? Many other variations on this can be imagined, and care should be taken before adoption of this factor.

Factor (d) deals with situations where child's residence income is below the threshold to qualify for public assistance, and at least one parent has sufficient income to pay additional support to raise the child's standard of living above the public assistance threshold. Will this be used to create one method of treatment for public assistance cases and another for non-public assistance cases? Although there are exceptions, in the majority of cases where one parent is at or below the poverty level, the other parent is in a similar economic situation. The Formula has a low-income deviation for low-income payers based upon a policy decision that the usual mathematical Formula calculation is excessive in such situations; in essence constituting a class of cases where deviation from the Formula is deemed to be uniformly appropriate. Will this factor allow a court to "undeviate" and apply the mathematical formula in low-income cases for the public purpose of removing a child from public assistance? If so, why is this only available when public assistance involved? If a noncustodial parent has low income, should it matter whether the custodial parent is receiving public assistance for the child? This may lead to a path that we should not take and allow unequal treatment under the law for similarly situated payers based upon factors beyond their control. This is done to a lesser extent based upon the recipient's financial position, but this could create much greater variations than the Formula

currently allows.

Factor (e) deals with situations where the parties have jointly incurred debt that limits the ability to pay support. While one dislikes the fact that the support for a child may be reduced because of the parents' financial irresponsibility, that is the reality of the situation. In intact families, excessive debt has a negative impact on the ability to support children. However, this does raise the possibility that children may be made to accept reduced support, when a filing of bankruptcy by either or both parents might be a preferable option from the standpoint of the support of the children.

Factor (f) deals with situation where property is awarded in lieu of support. This is considered in current law.

Factor (g) deals with situations where one or both parents are incarcerated without income or assets. Is there a need for this factor? If a party has no income or assets, should their incarcerated status have any relevance? Certainly it is hard to impute an ability to pay to a person in prison.

Factor (h) deals with situations where a parent has extraordinary medical expenses for themselves or a dependent. One presumes that this means non-voluntary medical expenses and not elective treatments such as cosmetic surgery, but perhaps clarification would be useful. The existence of extraordinary medical expenses has been widely viewed as a valid reason for deviation in the past.

Factor (i) deals with situation where either or both parents have irregular bonus income. Currently, all bonus income is to be considered as income. This factor would apparently allow some deviation from this absolute. As a practical matter, most triers of fact consider the regularity of bonuses, but clarification of this should not create any new problems and may remedy some inequities.

Factor (j) deals with situations where someone other than the parent can supply reasonable and appropriate health care coverage. In most circumstances, this would mean a stepparent of the primary custodial parent. This provision seems to allow requiring the noncustodial parent to contribute to the cost of coverage provided by the new spouse of the custodial parent, or perhaps reducing support if the new spouse of the noncustodial parent provides coverage, but the ramifications of this provision are unclear.

ADM 2003-22:4 will allow deviation when these factors are present, but does not require deviation. This may lead to inconsistent results between courts, which is something the Formula has traditionally sought to minimize. Further, this provision allows deviation for "any other additional factor that it determines to be relevant to the best interests of the child." Does this mean "best interests of the child" as defined by the Child Custody Act? This may open the gates to a wide area of "factors" under which deviation is allowed. A policy decision must be made as to whether this is appropriate.

The issue of deviation from the Formula is a difficult one. It highlights conflicting policy considerations. On the one hand, uniformity of results is sought. On the other hand, there is a desire to do equity under the particular circumstances of an individual situation, rather than taking a "one size fits all" approach to child support. This new subsection would allow greater use of judicial discretion and seeks to achieve a greater balance between the two conflicting policy considerations, but it must be carefully considered as to whether the balance proposed is the correct one.

Further clarification of ADM-2003-22:4 is needed before implementation.

ADM 2003-22:5 Medical Support – Allocation of Premiums.

This proposal will require the allocation of health care insurance premiums costs between the parents based upon the ratio of their respective incomes rather than retain the current practice of deducting the cost of such premiums from the income of the party who pays the premiums. This proposal appears equitable on the surface, but does not answer the question of who monitors the amount of the premium and how the cost is tracked. Health insurance premiums are not static. If the premium amount changes, will the order be "automatically adjusted"? Who is responsible for advising the Friend of the Court of premium changes? Or does the order stay the same even though the premium changes or terminates the insurance unless the order is specifically modified? What if additional dependents are added (e.g. after born children) and the portion allocable to the children of this case changes? Does this require a new order or is adjustment automatic?

What about those situations where a party can deduct health insurance premiums from taxable income? Should the tax savings resulting from this deduction reduce the amount assessable to the other parent as is done with the Child Care Tax Credit? How do you determine the amount of attributable tax savings? If the parent paying the premiums takes a tax deduction, do they have to declare any reimbursement received from the other parent as taxable income?

The theory behind this proposal is sound and the treatment equitable, but the "devil is in the details". The ongoing administration of the proposal will be difficult, and it is doubtful that Friends of the Court staff can adequately monitor it with existing resources. Each change in premium or child status may require modification of the support order. This could easily lead to increased litigation based upon this issue, and further strains on already overburdened Friend of the Court, judicial and referee resources. Before this policy is implemented, an economic impact assessment should be done, as the court system as currently established will have difficulty administering this new policy.

Further, if the other parent is required to pay an allocated portion of the insurance premium, what voice does that parent have in deciding what level of coverage is appropriate when multiple levels of coverage are available? If both parents have a variety of health insurance plans available to them, and if Parent A is the primary custodian and he or she has one level of coverage, what if Parent B has chosen a less expensive level of coverage for his or her household because of economic considerations? Should Parent B only be required to contribute only at the level of the lowest cost coverage available to Parent A for coverage of the children?

There are many issues here that are not readily apparent but will cause confusion and discontent in the application of this policy change.

Further clarification of ADM-2003-22:5 is needed before implementation.

ADM 2003-22:6 Medical Support – Premiums for Other Children.

This proposal will consider the portion of health insurance premiums paid by a parent for all children that parent is legally obligated to support as an allowable deduction from gross income. This seems to conflict with ADM 2002-22:5, which eliminates the deduction from gross income for this expense.

The proposal differs from current practice, in that currently only the expense attributable to the children of the particular case involved are deductible. Thus, if the premium covers two children on the case at hand and three children in another case, only 40% of the premium would be deductible in the case at hand. Yet the premium for coverage is often the same whether it covers one child or many. This policy would be broader than the current one and is arguably more equitable.

Reading this in conjunction with ADM 2003-22:5, does each parent deduct the portion of the health care premium for which they are responsible? For example, suppose Parent A has net income of $3000 per month and Parent B has net income of $2000 per month. If health insurance coverage costs $400 per month then based upon ratio of their incomes, Parent A would be responsible for 60% ($240) and Parent B would be responsible for 40% ($160). After payment of this, Parent A would have net income of $2760, and Parent B, $1840. If support for five children were considered before deduction of premiums, Parent A would pay $1386 per month for five children. If the premiums are deducted from gross income before calculation of support. the support payable by Parent A drops to $1300 per month. Therefore, the increase in the total paid by parent A is from $1386 to $1540 ($1300 +$240 premium), or $154, partially offsetting the allocated premium amount.

I support ADM 2003-22:6 in principle. However, various refinements are needed, as discussed above.

ADM 2003-2:7 Medical Support – Reasonable Cost of Insurance

The proposal will substantially change the support approach to what constitutes a "reasonable" cost of health insurance for a parent, changing it to 5% of the gross income of the parent. However, if the net income of the parent is less than 133% of the federal poverty level ($738 per month * 1.33 = $981.54 per month, or about $225 per week), or if the child living with a parent is covered by Medicaid, that parent should not be ordered to provide private coverage unless that private coverage does not require an employee contribution to obtain.

How does this apply to sporadically employed parents? Do we look to annual income? As with some of the other proposals, the principle is simple, but the application is complex.

A further wrinkle is that the parent's total cost of child support, child care, ordinary health care expenses, and net share of health care insurance (not including arrearage payments) should not

exceed 50% of the parent's net income as defined by the Formula. Of course, the Consumer Credit Protection Act has limits (50-65% of net disposable income) that apply to what can be withheld from earnings.

What if the cost of total child support, child care and ordinary health care expenses comes to 47% of net income, and the cost of health care premiums, otherwise reasonable, comes to 6% of net income? Should the court assess a partial amount equal to 3% of net income to bring the total cost up to 50%, or not assess anything for health care premiums because the total cost is "unreasonable"? While this would be subject to interpretation, if the cost brings the total to over 50% of net income, it appears that the cost of insurance would be deemed "unreasonable" and therefore it should not be assessed. The alternative would be an adjustment every time that income changed, tax rates changed, or insurance premiums changed.

The commentary to this subsection cites research as to health care costs from as far back as 1980 in support of the reasonable costs of health insurance premiums. Persons familiar with the costs of health coverage know that these costs have been increasing by as much as 25 to 30 percent annually in many years, and must question the relevance of this dated information.

Further clarification of ADM-2003-22:7 is needed before implementation.

ADM 2003-22:8 Medical Support – Responsibility to Insure

Subsection levels 1(a) and (c) express provisions of current Michigan law. Why should they be repeated in the Formula Manual? If Michigan law changes, it will then be necessary to change the Manual as well. Leaving them out of the Manual or incorporating them by reference avoids this problem.

Subsection level 1(b) lists factors to be used in determining which parent or parents should maintain health insurance coverage for a child. These include a) accessibility and comprehensiveness of included services b) likely continuation of coverage, affordability of deductibles and co-payments (split as ordinary expenses, below) and reasonableness of the cost of coverage. This provision is worded as a directive, i.e., these are the factors to be considered. There is no language that permits consideration of "any other factor" as in other subsections such as 1.04(D). Some language allowing other factors to be considered would seem to be advisable.

There are substantial flaws in ADM 2003-22:7 and further work is needed.

ADM 2003-22:9 Medical Support Changes

This proposal allocates a basic cost of $280 per year per child (up to 5) between the parents and adds the payer's portion of this cost to his or her monthly child support obligation. The amounts are increased to $280 per calendar year for one child, $560 per year for two children, $840 per year for three children, $1120 per year for four children, and $1400 per year for five or more children.

It would be administratively easier for the FOC's if this were changed to annually from the date of the Judgment of Divorce, Paternity, etc. rather than by calendar year, as this would spread the

work more evenly throughout the year.

It is unclear how the annual expense thresholds will be adjusted for orders beginning or terminating during the calendar year, if at all. However, it seems appropriate to pro-rate the threshold number in the same manner as general support is prorated, e.g., if a support order is effective July 1st, the threshold amount for the remainder of that calendar year would be ½ of the annual amount, to-wit: $140, $280, $420, $560, $700 thresholds for 1,2,3,4, and 5 or more children, respectively. The proposal seems flawed in not addressing this "partial-year" issue. Similarly, if is unclear how the Formula will deal with the situation where a child attains majority during a calendar year. For example, if one of two children attains age 18 on June 30, is the annual ordinary medical adjustment based upon $280, $560, or the pro rated amount of $420 (two children 6 months and one child six months)? The proposal does not address this issue.

I support ADM 2003-22:9 in principle, but further clarification is needed. The monitoring of expenses should be based upon a fiscal year commencing with the order date rather than a calendar year, to better spread the workload for the Friend of the Court. Some provision for pro-ration of the calculation in partial years, and in cases of multiple children, where one child becomes emancipated during a year.

ADM 2003-22:10 Shared Economic Responsibility 52 Overnights and Cubing

This proposal will reduce the number of overnight periods that a child spends with a parent before the Shared Economic Responsibility Formula (SERF) to 52, reduced from 128 overnights in the current Formula. The SERF will probably now apply in the majority of cases, as it is the equivalent of the number of overnights in alternating weekends. What was the exception will now be the rule. The support amount can be adjusted retroactively under some circumstances if the actual number of overnights varies more that 21 days from what was expected in the order. The current SERF involves squaring the number of overnights with each parent; the proposed SERF provides for cubing these numbers. This change softens the "cliff effect" and does not seem to have generated much controversy, although the cubed calculation raises the recommended level of support in most situations. **I support changing the calculation from squaring to cubing.**

Adjustment for Deviation from projected number of days.

The proposal provides that if the actual number of overnight periods the child spends with each parent deviates more that 21 overnights from the number of overnights projected in the order, some adjustment to the support amount may occur. MCSF 3.06. Assuming that the statutory prohibition against retroactive modification of child support orders can be overcome, if the support payer exercises more than 21 more overnights than was contemplated in the order, the support reduction will be a "50% reduction of the general daily support . . . for the additional number of overnights exercised." If the support payer exercises more than 21 fewer overnights than was contemplated in the order, the support adjustment "will be addition of the daily difference between payer's general support amount … and the shared economic responsibility amount order for the additional number of days."

What do these calculations look like? Please refer to Addendum A. From this difference, I conclude that *the proposed methods of adjustment found in 3.06(B) and 3.06(C) are unjust and inappropriate.* In place or the proposals, I suggest the following substitution:

> *"3.06(B) If the support payer exercises a significantly different number of overnights than the number upon which the current order is based, the support amount shall be recalculated using the same financial information for the parties upon which the current order was based, but calculated using the number of overnights determined to have actually been exercised."*

This revised method is simpler than the proposal, and treats deviation in the same manner regardless of whether the number of overnights exercised is greater or less than the number contemplated under the current order.

Of course, this does not deal with the adjustment complexity that occurs if less than all the children spend more or less time with Parent A, e.g., Child 1 spends 128 overnights, Child 2 spends 100 overnights, Child 3 spends 150 overnights and child 4 spends 200 overnights. This would perhaps require looking at the average number of overnights for all children. For example, this would be calculated (128 + 100 + 150 + 200) / 4 = 144.5 overnights and adjusting the support if the average number of overnights was a deviation of more that 21 overnights from what was ordered.

The example I created does not include the ordinary health care adjustment in the calculation. However, the health care adjustment should remain the same regardless of the number of overnights exercised ($60 per month in my example), as it is based upon the relative income of the parties and not the number of overnights exercised, so its inclusion or exclusion has no impact upon the adjustment calculation.

The proposed adjustments for deviation from the designated overnight periods under proposed ADM 2003-22:10 is substantially and irretrievably flawed. The suggested substitute, or some variation of it, should be adopted as more equitable.

ADM 2003-22:11 Social Security Benefits

This proposal clarifies that social security benefits received by the children in the case under consideration, other than those based upon the earnings record of the noncustodial parent, are considered as income to the custodial parent. Social Security benefits received by the children based upon the earnings record of the noncustodial parent are to be considered income of the noncustodial parent, even though the noncustodial parent does not receive them.

I support ADM 2003-22:11

Addendum A

Example for
Administrative Memorandum 2003-22:10

	Primary Physical Custody w/Parent B	Court Order Written for Specific Qty of Nights	Proposed Formula Effect on Credit To Order for 158 Nights	Net Effect on Child Support
Nights per year	365	**158**		
Support Obligation	$1,290/mo $15,480/yr	$676/mo $8,112/yr	NA	
Nights per year (increase visitation by 30 days)		**188**	Adjustment of +30 days to order	
Support Obligation – 50% reduction of support		$203/mo $2,436/yr	-$304/mo $7,808/yr	$2,436-7,808 = **$5,372**
Nights per year (decrease visitation by 30 days)		**128**	Adjustment of –30 days to order	
Support Obligation – 50% reduction of support		$1,1018/mo $12,216/yr	+$614/mo $8,726	$12,216 – 8,726 = **($3,490)**

What do these calculations look like? Assume a situation where the order provides that Parent A will have 158 overnights with the four minor children of the parties. Assume that Parent A has gross income of $1,000 per week. Parent B has gross income of $500 per week. For simplicity, assumed that both parents file taxes as single with one dependent (which of course they would not). At 2003 tax rates, this would result net monthly income for Parent A of $3,164, and net monthly income for Parent B of $1,728.

The hypothetical situation, then, is:

Parent A has net monthly income of $3,164.
Parent B has net monthly income of $1,728.
The order provides that the four children of the parties will spend 158 overnights per calendar year with Parent A.

Using the proposed Formula with cubing in the SERF, the General Care portion of the monthly child support obligation of Parent A in this example in a situation if primary physical custody of four children was with Parent B would be $1290. With 158 overnights with Parent A, this drops to $676 per month, or $8,112 per year. (With the squaring formula it is $6,792 per year).

If the children actually spent 188 overnights with Parent A, under the proposed adjustment Parent A would be entitled to a credit equal to 50% reduction of the general daily support for the number of additional overnights exercised. In this example, this would be 50% * .033 per day * (1290 – 676) * 30 days, or a reduction of $304, bringing the yearly support amount down to $7,808. If, however, the support were recalculated based upon the 188 overnights for the entire year, support for General Care under the SERF at 188 overnights would drop to $203 per month, or $2,436 per year. This is a difference of $5,372 per year for the same number of overnights, contingent only upon whether the order initially stated 158 overnights or 188 overnights.

If the children instead only spent 128 overnights with Parent A, then under the proposed adjustment Parent B would be entitled to additional support equal to addition of the "daily difference between payer's general support amount … and the shared economic responsibility amount order for the additional number of days." This calculation would be .033 per day * (1290 – 676) * 30 days, or an increase of $614 for a total of $8,726 per year.

If, however, the support were recalculated based upon 128 overnights for the entire year, support under the SERF at 128 overnights would increase to $1018 per month or $12,216 per year. This is a difference of $3,490 per year for the same number of overnights, contingent only upon whether the order initially stated 158 overnights or 128 overnights.